Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

TANYA ENGLISH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fourth Circuit Court of Appeals err in affirming the district court's granting of the defendant's motion to dismiss pursuant to FRCP 12(b)(1) and (6) by erroneously interpreting the law?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner Tanya English is an individual.

Respondent

Respondent is the United States of America.

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Tanya English respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reproduced in App. A at 1a-2a, The opinion and order of the United States District Court for the Eastern District of Virginia is unreported and is reproduced in App. B at 3a-14a. The decision of the court of appeals denying the petition for rehearing *en banc* is unreported and is reproduced in App. C at 15a-16a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was issued on December 20, 2000; however it was not mailed to counsel's proper address, Counsel requested an extension of time, which was granted, to file a petition for rehearing and suggestion for rehearing *en banc* which was denied by that court on March 20 , 2001. (App. D at 17a-18a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On August 4, 1999, Appellant English filed her lawsuit against the United States of America alleging a claim arising out of the Federal Tort Claims Act, 28 U.S.C. §§ 2671 through 2680. She alleged that she was the wife of an active duty sailor, CTO2 Michael A. English, U.S.N. who was stationed at Northwest Security Group Activity, Chesapeake, Virginia.

That on numerous occasions she called the Command Master Chief, Beverly Fouderon, to advise her of her husband's violent mood swings and to beg that the command get her husband help to protect him and herself. Nothing was ever done and on March 6, 1995, English's husband shot English and turned the gun on himself and killed himself.

Following are the facts: English was married to CTO2 Michael A. English who was on active duty with the United States Navy stationed at Northwest Security Group Activity, Chesapeake, Virginia when, (hereinafter "Command"), on March 6, 1995, she was shot in the face by her husband who then turned the gun on himself and committed suicide. Prior to the infliction of this grievous wound, Appellant had complained to her husband's Command concerning her husband's suicidal ideations and his wide and violent mood swings that included violence and rage towards her. Appellant repeatedly called the Command Master Chief, Beverley Fouderon, to tell her of her husband's violent mood swings and to beg the Master Chief to get her husband into counseling or treatment available through Navy medical facilities because of her fear for her and her husband's safety. Despite these pleas for help, nothing was ever done to effect the counseling or treatment nor to give any aid or comfort to the Appellant or her husband. Since Appellant's husband was on active duty in the United States Navy, the Navy was the sole source and provider for his medical and psychiatric care. The United States Navy was concerned about CTO2 Michael A. English's violent, dangerous and uncontrollable rages to the extent that it banned him from participating in Command sanctioned intramural basketball games. However, the United States did nothing to provide for the medical (psychological) care of CTO2 Michael A. English nor to provide for the Appellant's safety from the violent rages of

her husband which they were well aware.

PROCEEDINGS BELOW

English filed her suit against the United States alleging that the United States was negligent in not protecting her from the violent outbursts and physical threats of her husband. The United States knew of his violent outbursts and took preventative action to protect Navy personnel when the command barred Michael English from further participation in the intramural basketball league.

The United States filed its motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). The district court granted the government's motion . (App. B at 3a-14a).

On appeal to the Fourth Circuit, English urged the court to overrule the district court as to the districts court's misinterpretation of the law and, more particularly, this Court's holding in *Sheridan v. United States*, 487 U.S. 392 (1988). The Fourth Circuit issued its opinion on December 20, 2000 affirming the district court' decision. (App. A at 1a-2a). A request for rehearing and rehearing *en banc* was denied on March 20, 2001. (App. C at 15a-16a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

The Court of Appeals, when reviewing a district court's grant of a Rule 12 (b)(1) motion to dismiss, must assume the truth of the material facts as alleged in the complaint. *Summit Health, Ltd. v. Pinhas* , 500 U.S. 322, 325, 111 S.Ct. 1842, 1844-45,

114 L.Ed.2d 366 (1991); *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 89 (4th Cir.1978), *cert. Denied*, 442 U.S. 947, 99 S.Ct. 2895 (1979).

This Court, in *Sheridan v. United States*, 487 U.S. 392 (1988), held that the intentional tort exception to the FTCA is not always a jurisdictional bar to recovery. *Id.* 400-403. In *Sheridan*, this Court agreed with Chief Judge Winter's dissent in *Sheridan v. United States*, 823 F.2d 820 (4th Cir. 1987) and found that:

> "...where government liability is independent of the assailant's employment status, it is possible to discern two distinct torts; the intentional tort (assault and battery) and the government negligence that precipitated it. Where no reliance is placed on negligent supervision or respondeat superior principles, the cause of action against the government cannot really be said to 'arise out of' the assault and battery; rather it is based on the government's breach of a separate legal duty."

Id. at 397-98.

In the case at bar, the United States assumed a duty to protect the Appellant, Tanya English, from the violent and destructive behavior of her husband, CTO2 Michael A. English. Appellant's husband's Command took affirmative precautionary steps to protect its personnel from CTO2 English when they banned CTO 2 Michael A. English from the intramural basketball league due to his explosive and violent outbursts on the basketball court. Thus, the Command knew that CTO2 Michael A. English was prone to violence and would have violent outbursts in the future and was a danger

to himself and others, especially since the Appellant had advised them of his violent temper, threats against her and his suicidal ideations assumed a duty which it owed to the Appellant. By taking steps to protect others from English, the Command took charge of him and exercised control over him during the relevant time periods. This factor is important because under Virginia law, which must be applied in this case, there must exist a particular relationship between the actor and the third party in order for there to be a finding of liability.

The Virginia Supreme Court's holding in *Nasser v. Parker*, 249 Va. 172, 455 S.E.2d 502 (1995) is enlightening on the aforementioned issue. There, the supreme court held that in construing §315(a) of the Restatement of Torts one must look at §§316-19 to determine whether there exists a relationship between the actor and third party which requires the actor to control the third person's conduct. *Id.* at 178. Section 319 provides as follows: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise care to control the third person to prevent him from doing such harm." *Id.*

The Command, under the analysis mandated by the Virginia Supreme Court in *Nasser*, clearly took charge of CTO 2 Michael A. English by the very fact that they controlled his ability to continue playing in the intramural basketball league on the base. In essence, by banning CTO 2 Michael A. English from the intramural basketball league they did so with the intent of protecting other players and members of the Command from his violent and sudden outbursts on the basketball court and to protect them from bodily injury. Additionally, the Navy was the sole source and provider for

CTO2 English's medical and psychiatric care. Thus, according to the rationale of *Nasser* a special relationship was formed between the actor, the United States, and the third party, Michael A. English, to cause the actor to have a duty to the class of prospective victims which includes the Appellant. *Nasser* at 179.

Further, the Virginia Supreme Court in *Dudley v. Offender Aid and Restoration, Inc.*, 241 Va. 270, 401 S.E.2d 878 (1991) held that :

> "a person likely to cause bodily harm to others if not controlled, in the language of Restatement § 319, is a potential threat to all who come within his reach, and in those circumstances, one who takes charge of such a dangerous person incurs a § 319 duty to an entire class of prospective victims. . .to control his dangerous charge."

Id at 279.

The district court's opinion, which the court of appeals affirmed, holds that a "defendant has not taken charge of a third person unless the defendant is vested with a ***heightened ability to control and direct the third party's actions*** (emphasis added). This contemplates active and continuous supervision by the defendant over the third party; a defendant's ability to control the third party only under certain specific circumstances is insufficient to create a special relationship." (App. B at 10a). As a consequence of his enlistment in the United States Navy, CTO2 English was on duty twenty-four hours per day, seven days per week, throughout his enlistment. As such, CTO2 English was subject to the control, in virtually every aspect of his life, by the

United States Navy and his Command. It is axiomatic that the military forces of the United States have world-wide jurisdiction over an active duty service member. *Solorio v. United States,* 483 U.S. 435 (1987). As such, the United States may lodge criminal charges against an active duty member of the armed forces for offenses committed anywhere in the world, whether that service member is on duty or off duty. Thus, the United States has world-wide control of an individual service member for any and all criminal offenses he may commit, twenty-four hours per day, seven days per week, 365 days per year. *Solario* is cited to demonstrate the issue of control of a service member's actions by having the ability to hold that service member liable for his misdeeds. Further, whether CTO2 English was at work, traveling or out at the mall, he was subject to the rules and regulations of the United States Navy, the Department of Defense, the Uniform Code of Military Justice and all lawful orders received from his superiors. As such, the United States was, as the district court held, vested with a heightened ability to control and direct CTO2 English's actions.

The district court also relied on *Thigpen v. United States,* 800 F.2d 393 (4th Cir. 1996) and *Hughes v. United States,* 662 F.2d 219 (4th Cir. 1981). *Thigpen* involved the sexual assault of two young girls by a Navy corpsman in a Navy hospital. *Hughes* involved the sexual assault of two young girls by a postal letter carrier. The Fourth Circuit held, in both cases, that the Federal Tort Claims Act did not waive sovereign immunity for intentional torts and therefore, the district courts properly granted the United States' Rule 12(b)(1) motions.

In the case at bar, while the injuries sustained by the Appellant were sustained in relation to an intentional tort, this Court held that that fact alone does not automatically preclude

the viability of the lawsuit. *Sheridan v. United States,* 487 U.S. 392 (1988). The *Sheridan* Court found that the § 2680(h) exception of the Federal Tort Claims Act is inapplicable to torts committed by a government employee not acting within the scope of his employment, since such torts do not fall under the § 1346(b) waiver in the first instance. *Sheridan* at 401. This Court then held that the negligence of government employees who allow a foreseeable battery to occur could furnish an independent basis for liability under state law. *Id.* at 401-403.

In the present case, the grievous assault took place in the Englishes' off base quarters at approximately 12:30 a.m., a time when CTO2 English was off duty and not performing any official duties. Thus, as the *Sheridan* Court held, there may be an independent basis under state law to proceed on. *Id.*

Under the analysis provided by the Virginia Supreme Court's decision in *Nasser v. Parker,* 249 Va. 172, 455 S.E.2d 502 (1995), discussed *supra.*, there is a cause of action based on the Command's negligence in not protecting the Appellant from CTO 2 English's violent behavior towards her.

The district court's reliance on *Wise v. United States,* 8 F.Supp. 535 (E.D.Va. 1998) is inapposite to the facts of this case as the plaintiff in *Wise* alleged that it was the SEAL training that made the two service members turn into lethal weapons with a sense of heightened invincibility and that the government had a duty to protect people coming into contact with a SEAL and to control their team members. The district court held that there had been no assumption of a duty to the plaintiff. Such is not the gravamen of the allegations in the instant case and that analysis is not appropriate.

Thus, under the analysis of this Court's decision in

Sheridan in conjunction with the Virginia Supreme Court's decision in *Nasser*, the court of appeals erroneously affirmed the district court's granting of the United States' motion to dismiss based upon the foregoing analysis of the facts and the applicable law.

II. THE QUESTION PRESENTED IS IMPORTANT

Since this Court in *Sheridan v. United States, supra.*, raised the issue of the United States' liability for negligence when an intentional tort was involved, there must be a bright line drawn by this Court to avoid the confusion that exists in the various courts of appeals.

Certiorari jurisdiction is warranted to correct this error and clarify the law.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,
TANYA ENGLISH

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1811

TANYA ENGLISH,

Plaintiff - Appellant,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk, Raymond A. Jackson, District Judge. (CA-99-1244-2)

Submitted: November 30, 2000 Decided: December 20, 2000

Before LUTTIG, MICHAEL, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Michael D. Kmetz, Norfolk, Virginia, for Appellant. David W. Ogden, Assistant Attorney General, Helen F. Fahey, United States Attorney, Robert S. Greenspan, E. Roy Hawkens, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. Local Rule 36 (c).

PER CURIAM:

Tanya English appeals the district court's order granting the United States' motion to dismiss her Federal Torts Claim Act action under Fed. R. Civ. P. 12(b)(1), (6). We have reviewed the parties' briefs, the joint appendix, and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. English v. United States, No. CA-99-1244-2 (E.D. Va. May 24, 2000). * We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

* Although the district court's order is marked as "filed" on May 23, 2000, the district court's records show that the order was entered on the docket sheet on May 24, 2000. Pursuant to Fed. R. Civ. P. 58 and 79(a), we consider the date the order was entered as the effective date of the district court's decision. See Wilson v. Murray, 806 F.2d 1232, 1234-35 (4th Cir. 1986).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

TANYA ENGLISH,

Plaintiff,

v. CIVIL ACTION NO. 2:99CV1244

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendant's motion, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss the action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. For the reasons stated below, Defendant's Motion to Dismiss is **GRANTED.**

1. FACTUAL AND PROCEDURAL HISTORY

Plaintiff is the widow of deceased Navy Petty Officer Michael A. English, who at the time of his death was stationed at Northwest Security Group Activity in Chesapeake, Virginia. According to the Complaint, Plaintiff had made several complaints to English's commanding officers prior to English's death regarding his suicidal ideations, mood swings, and violent temper, which

included anger and violence directed at Plaintiff. During the court of these complaints, Plaintiff requested that English be placed in counseling or treatment through Navy medical facilities. However, no one responded to her entreaties, and no action was ever taken to meet the needs of Plaintiff or her husband.

On March 6, 1995, English shot and injured Plaintiff and then committed suicide. Plaintiff alleges that her injuries resulted from the negligence of Defendant United States in failing to protect Plaintiff from English and in failing to provide English with appropriate medical and psychological treatment.

Plaintiff filed this action pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1346, 2671-2680, on August 4, 1999, requesting relief in the amount of ten million dollars. On December 10, 1999, Defendant filed the instant motion to dismiss. Plaintiff filed her response on December 23, 1999, and Defendant filed its response on December 30, 1999. Neither party has requested a hearing, and the Court finds that a hearing would not aid in the determination of this matter. Accordingly, the matter is ripe for judicial decision.

II. LEGAL STANDARDS

In the context of a Rule 12(b)(1) motion to dismiss, the plaintiff has the burden of proving subject matter jurisdiction. *See Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 768 (4th Cir. 1991). All factual allegations in the Complaint are assumed to be true. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). The Court may consider evidence outside the pleadings to determine whether subject matter jurisdiction exists. *See Richmond*, 945 F.2d at 768. Furthermore, "[t]he moving party should prevail only if the material jurisdictional facts are not in

dispute and the moving party is entitled to prevail as a matter of law." *Id.*

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint that fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A motion to dismiss should not be granted unless it is beyond doubt that Plaintiff can prove no set of facts which would entitle him to relief. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In considering a motion to dismiss, the Court must accept as true the allegations in the Complaint and draw all reasonable inferences in favor of the Plaintiff. *See Hughes v. Rowe*, 449 U.S. 5, 10 (1980); *Boring v. Buncombe County Bd. Educ.*, 136 F.3d 364, 367 (4th Cir. 1998). Thus, the standard for granting a motion to dismiss pursuant to Rule 12(b)(6) is strict. *See Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978).

III. DISCUSSION

A. Sovereign Immunity and the Federal Torts Claims Act

The United States is immune from suit unless it specifically waives its sovereign immunity. Absent such waiver, the Court does not have subject matter jurisdiction over an action against the United States. *See Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994); *United States v. Orleans*, 425 U.S. 807, 813-14 (1976). The consent to suit must be statutory and specific, and waivers of sovereign immunity must be strictly construed. *See United States v. Shaw*, 309 U.S. 495, 500-01 (1940); *Radin v. United States*, 699 F.2d 681, 684-85 (4th Cir. 1983). The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, provides for a limited waiver of sovereign immunity for certain torts committed by government employees acting in the scope of

their employment. *See* 28 U.S.C. § 1346(b)(1). Under the FTCA,

> the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act of omission of any employees of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

However, the FTCA creates several exceptions to its waiver of sovereign immunity for tort claims. Section 2670(h), the "intentional torts" exception, provides that the waiver does apply to

> [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . .

28 U.S.C. §2680(h). It is well-settled that this exception bars suit attempting to hold the United States directly liable, on a *respondeat superior* theory of liability, for an assault or battery committed by a government employee. *See Stepp v. United States*, 207 F.2d 909, 911 (4th Cir. 1953).

Following the plurality opinion of the United States Supreme Court in *United States v. Shearer*, 473 U.S. 52 (1985),

the United States Court of Appeals for the Fourth Circuit has held that negligent supervision claims are also barred by the intentional torts exception if the claim actually arose out of an assault or battery by a government employee. *See Thigpen v. United States*, 800 F.2d 393, 395 (4th Cir. 1996); *Hughes v. United States*, 662 F.2d 219, 220 (4th Cir. 1981). *Hughes* arose out of a postal letter carrier's sexual assault on two young girls. Several years before, the postal worker had been arrested for similar conduct, and had pleaded guilty to lesser charges. The plaintiff claimed that the United States was negligent in failing to relieve the postal worker of his duties after the first incident. The court held that, although the claim was framed in terms of negligence, it actually arose out the batteries committed by the postal worker, and thus was barred by section 2680(h). *See Hughes*, 662 F.2d at 220. Similarly, *Thigpen* involved the sexual assault of two young girls by a naval hospital employee. The plaintiff sued the United States for negligence, based on the failure of the physicians and hospital staff to properly supervise the employee. The court found that the intentional torts exception bars all claims, even those alleging negligence, that "rely on the existence of an assault or battery by a government employee." *Thigpen*, 800 f.2d at 392.

However, in *Sheridan v. United States*, 487 U.S. 392 (1988), the Supreme Court held that the intentional torts exception to the FTCA does not preclude government liability for negligence based on an assault or battery by a government employee in all situations. *Sheridan* involved an assault and battery by an intoxicated off-duty navy serviceman who fired shots at plaintiff's automobile as it drove down a public street. The court found that the section 2680(h) exception is inapplicable to torts committed by a government employee not acting within the scope of his employment, since such torts do not fall under the section 1346(b) waiver in the first instance. *See Sheridan*, 487

U.S. at 401. The court then held that the negligence of government employees who allow a foreseeable battery to occur could furnish an independent basis for liability under state law. *See id.* at 401-03.

The court in *Sheridan* did not consider whether supervision, training, or hiring based on a foreseeable assault or battery could ever provide the basis for liability under the FTCA. However, the Fourth Circuit has indicated that the Supreme Court's holding in *Sheridan* did not affect its pre-*Sheridan* rule that negligent supervision claims arising out of an assault or battery are barred by the intentional torts exception to the FTCA. *See Sheridan v. United States*, 969 F.2d 72, 75 (4th Cir. 1992); *Perkins v. United States*, 55 F.3d 910, 916-17; *Wise v. United States*, 8F. Supp. 2d 535, 545 (E.D. Va. 1998).

Plaintiff claims that the United States was negligent for failing to properly control or counsel English, despite his supervisors' awareness of his violent temper. Plaintiff alleges that the United States is liable for English's intentional tort because, as his employer, it had a duty to control and care for him. This is essentially a negligent supervision claim, which is barred by section 2680(h). *See Sheridan v. United States*, 969 F.2d at 75. Although the claim is framed in terms of negligence, it depends entirely on the underlying battery committed by English, and thus falls within the purview of the intentional torts exception. *See Thigpen*, 800 F.2d at 395-96; *Hughes*, 662 F.2d at 220; *Wise*, 8 F. Supp. 2d at 545. Thus, Plaintiff's claim is barred because the United States has not waived its sovereign immunity to the suit. Accordingly, the Defendant's motion to dismiss for lack of subject matter jurisdiction is granted.

B. Liability Under Virginia Law

However, the Court nevertheless considers whether the negligence of the government's employees furnishes a basis for liability under state law, independent of English's employment status. *See Sheridan v. United States*, 487 U.S. at 401. Plaintiff argues that the United States' knowledge of English's violent temper and attempts to take charge of English render it liable for negligence without regard to English's status as a member of the military. Accordingly, the Court must determine whether, under Virginia law, the United States may be held liable for negligence for failing to control English or protect Plaintiff.

Under Virginia law, there can be no liability for negligence unless there is a legal duty, a violation of that duty, and resultant damage. *See Fox v. Custis*, 372 S.E. 2d 373, 375 (Va. 1988). Thus, the Court must first determine whether the United States owed a duty of care to Plaintiff. *See id.*

A person ordinarily has no duty to control the third persons in order to prevent harm to another. *See id.* Virginia follows the Restatement rule that no such duty exists unless (a) there is a "special relation" between the defendant and the third party which imposes a duty on the defendant to control the third person's conduct; or (b) there is a "special relation" between the defendant and the plaintiff which gives the plaintiff a right to the defendant's protection. *See Marshall v. Winston*, 389 S.E. 2d 902, 904 (Va. 1990) (quoting Restatement (Second) of Torts § 315 (1965)); *Fox*, 372 S.E. 2d at 74 (same). A special relationship exists between the defendant and a third party if the defendant "takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled." *Marshall*, 389 S.E. 2d at 904 (quoting Restatement (Second) of Torts § 319 (1965)).

Plaintiff argues that Defendant knew English was dangerous and likely to cause injury, because Plaintiff had repeatedly expressed her concerns to his supervisors and requested their assistance. Plaintiff alleges that Defendant's knowledge of English's dangerous propensities is further evidenced by the fact that it banned him from the intramural basketball team due to his violent temper. According to Plaintiff, there was a special relationship between the United States and English stemming from the Navy's extensive control over English, as a military serviceman. Plaintiff maintains that the fact that the Navy could order English to undergo psychological counseling and the fact that it could, and did, ban English from the intramural basketball team demonstrate that Defendant clearly took charge of English to such an extent that it created a special relationship.

The case law makes clear that a defendant has not taken charge of a third person unless the defendant is vested with a heightened ability to control and direct the third party's actions. This contemplates active and continuous supervision by the defendant over the third party; a defendant's ability to control the third party only under certain specific circumstances is insufficient to create a special relationship.

In *Fox* the court found that parole officers did not take charge of a parolee such that a special relationship was formed. *See Fox*, 372 S.E. 2d at 376. *Fox* involved a parolee who had been released from incarceration and had committed several crimes while on parole. The victims sued the state parole officers, contending that because they were statutorily required to "supervise and assist" the parolee throughout the period of parole, they had sufficient control over the parolee to create a special relationship. The court found that the parole officers did not enjoy "hourly or daily dominance and dominion" over the parolees, noting

that although the parolees were required to adhere to specific rules and to report certain activities to the parole officers, they were "essentially free to conduct their day-to-day affairs." *Fox*, 372 S.E. 2d at 376. It thus held that no special relationship was formed. *See id.* Following the reasoning in *Fox*, Virginia courts have also held that an ordinary doctor-patient relationship does not give the doctor control over the patient sufficient to establish a special relationship. *See Nasser v. Parker*, 455 S.E. 2d 502, 506 (Va. 1995); *see also Sage v. United States*, 974 F. Supp. 851, 861-62 (E.D. Va. 1997).

The Virginia Supreme Court did find a special relationship to exist in *Dudley v. Offender Aid & Restoration of Richmond, Inc.*, 401 S.E. 2d 878 (Va. 1991). *Dudley* involved a convicted felon who was serving a portion of his sentence in a halfway house. The security at the halfway house was extremely law, and the residents, all convicted felons, were left essentially unsupervised. The felon was thus able to escape undetected one evening, whereupon he raped and murdered a young woman. Plaintiff sued the owner and operated of the halfway house for negligently managing it. The court found that because the felon was still serving his sentence, he was still in the custody of the Department of Corrections, which had contracted his care to the halfway house. In assuming that custody from the Department of Corrections, the halfway house necessarily took charge of the prisoner within the meaning of the Restatement. The court contrasted the circumstances in *Fox*, noting that, unlike the parole officers in *Fox*, the halfway house "undertook a responsibility for very close and continuous supervision of its inmates." *Dudley*, 401 S.E. 2d at 881-82.

The circumstances of this case are not unlike those confronted by this court in *Wise v. United States*, 8 F. Supp. 535 (E.D. Va. 1998). In *Wise*, a woman was sexually assaulted and murdered by two off-duty members of the

Navy SEALs. The plaintiff alleged that since the purpose of SEAL training is to turn the trainee into a lethal weapon with a heightened sense of invincibility, the government had a duty to protect people coming into contact with a SEAL and to control SEAL members. The court found that no special relationship existed between the United States and the Navy SEALs, stating that "the government does not have a duty to control the actions of an off-duty soldier. The fact that the government has the power to exert complete authority over off-duty servicemen does not create a "special relationship" giving rise to a special duty to control their off-duty actions." *Wise*, 8 F. Supp. 2d at 549. The court noted that, like the parolee in *Fox*, the soldiers did not lose their right to freedom of movement merely by enlisting in the Navy, and that the government did not exercise continuous hourly or daily dominance over them. *See id; see also Sage*, 974 F. Supp. At 860, n. 7 (declining to find that the mere existence of a military relationship creates a "special relationship" under Virginia law).

Plaintiff here, like the plaintiff in *Wise*, attempts to establish the existence of a special relationship between English and the United States merely by virtue of English's status as an enlisted member of the military. The Court finds this status alone to be insufficient to satisfy the strict standard delineated by the cases discussed above. *See Wise*, 8 F. Supp. 2d at 549. Furthermore, the fact that English was required to use military facilities and to obtain permission from his commanding officers before seeking medical or psychological counseling, and that Defendant had the ability to order him to obtain counseling, does not vest Defendant with such extraordinary control over English

that it can be said to have "taken charge" of him.[1] Nor does the fact that the government controlled English's ability to play in the intramural basketball league create a special relationship. The basketball league constitutes only a small, presumably optional, part of a soldier's daily activities. The government's requirement that English adhere to certain specific rules, both in the context of the basketball league and in the context of obtaining medical services, does not imply its "hourly or daily dominance and dominion" over him, *see Fox*, 372 S.E. 2d at 376, and does not constitute the "very close and continuous supervision" required to establish a special relationship. *See Dudley*, 401 S.E. 2d at 881.

The Court thus finds that the United States had no duty to control English such that it was required to protect Plaintiff from any harm he might cause her. Accordingly, the Court finds that there is no basis under Virginia law for holding the United States liable for Plaintiff's injuries. To the extent Plaintiff's Complaint alleges state law claims independent of English's employment status, it must be dismissed pursuant to Rule 12(b)(6).

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[1]Plaintiff's reliance on *Solorio v. United States*, 483 U.S. 435 (1987), for the proposition that the United States military has worldwide jurisdiction over an active-duty service member is inapposite. *Solorio* examined the scope of court-martial jurisdiction, an issue entirely separate from, and irrelevant to, the extent of the government's control over the day-to-day movements of a service member.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) is **GRANTED.**

The Clerk is **DIRECTED** to send a copy of this Order to counsel for Plaintiff and to counsel for Defendant.

IT IS SO ORDERED.

/s/
Judge

Norfolk, Virginia
May 23, 2000

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 20, 2001

No. 00-1811
CA-99-1244-2

TANYA ENGLISH,

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,

Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied;

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D

FILED:
February 9, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1811
(CA-99-1244-2)

TANYA ENGLISH,

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,

Defendant - Appellee

ORDER

This case was affirmed by unpublished per curiam opinion on December 20, 2000. Appellant has filed a motion to stay mandate and to enlarge time for filing a petition for rehearing en banc. Appellant's counsel alleges in the

motion that appellant's copy of this Court's decision was mailed to the wrong address and counsel first learned of this Court's decision by telephone on February 5, 2001.

The Court grants appellant an extension of time until February 23, 2001 within which to file timely a petition for rehearing and/or a petition for rehearing en banc.

For the Court - By Direction

/s/ Patricia S. Connor

CLERK

No. 00-1898

In the Supreme Court of the United States

TANYA ENGLISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a plaintiff can avoid the statutory bar under the Federal Tort Claims Act on recovery for claims arising out of assault and battery, 28 U.S.C. 2680(h), by pleading that the government was negligent in supervising the government employee who committed the assault or battery.

2. Whether under Virginia law the government had a duty to prevent an off-duty service member, who was not on military premises, from committing a battery upon the plaintiff.

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In the Supreme Court of the United States

No. 00-1898

TANYA ENGLISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 238 F.3d 411 (Table). The opinion of the district court (Pet. App. 3a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2000. A petition for rehearing was denied on March 20, 2001 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on June 18, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* (1994 & Supp. V 1999), alleging that the United States negligently failed to prevent a battery upon petitioner by her husband, Michael A. English. Petitioner alleges that English, who was a Navy petty officer stationed in Chesapeake, Virginia, shot her with a gun and then turned the gun on himself and committed suicide. Pet. App. 3a-4a. The incident occurred shortly after midnight in the Englishes' off-base residence when English was off duty. Pet. 8; C.A. App. 5. Petitioner further alleges that on several occasions she requested English's supervisors to order him to undergo counseling because of his suicidal ideations, violent temper, and mood swings. Pet. App. 3a-4a. Petitioner claims that the government negligently failed to control or counsel English. *Id.* at 8a. She also argues that because English's violent outbursts led the Navy to suspend him from participating in intramural basketball games, the Navy took charge of English, so as to render it liable for negligence under Virginia law. *Id.* at 9a-10a.

The district court granted the government's motion to dismiss. Pet. App. 3a-14a. It held (*id.* at 6a-8a) that petitioner's claim was barred by the exception to the FTCA excluding coverage for "[a]ny claim arising out of assault [or] battery." 28 U.S.C. 2680(h). Alternatively, the district court held that the government was not liable under Virginia law for English's conduct because the Navy lacked a "special relation" to English that would impose a duty on it to control his behavior. Pet. App. 9a-13a.

The court of appeals affirmed on the reasoning of the district court in an unpublished opinion. Pet. App. 1a-2a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. Every court of appeals that has considered the issue except the Ninth Circuit has held that a plaintiff cannot avoid the FTCA's bar on recovery for claims arising out of assault or battery by pleading that the government negligently supervised the assailant. Although a circuit split exists on this issue, the unpublished decision below does not deepen the split. Moreover, this case is not an appropriate vehicle to resolve the conflict because there is an adequate state-law ground supporting the judgment.

1. The FTCA provides the exclusive remedy for tort actions against the United States, but only to the limited extent that the FTCA clearly and explicitly waives sovereign immunity. 28 U.S.C. 2679(a) and (b)(1). In providing this remedy, Congress expressly barred recovery for a number of intentional torts, including "[a]ny claim arising out of assault [or] battery." 28 U.S.C. 2680(h).[1]

This Court considered the scope of the intentional tort exception in *Sheridan* v. *United States*, 487 U.S. 392 (1988). Contrary to petitioner's suggestion (Pet. 4), *Sheridan* did not hold or even suggest that a plaintiff

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[1] Section 2680 provides, "The provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h).

may circumvent the statutory bar on recovery for injuries arising out of an assault or battery by pleading that the United States was negligent in supervising the assailant.[2] In *Sheridan*, this Court held that claims based on an independent duty, such as a duty to protect a victim or a good-samaritan duty, are not barred by the assault and battery exception where the assailant (1) is not a federal employee or (2) is a federal employee acting outside the scope of his employment. 487 U.S. at 400-401. Notably, the majority expressly declined to consider whether claims based on an employment relationship (negligent hiring, supervision, or training) are barred by the assault and battery exception. *Id.* at 403 n.8. In a concurring opinion, Justice Kennedy explained that he would have reached the reserved question and would have held that a plaintiff may not maintain a claim based only on the employment relationship between the intentional tortfeasor and the government. *Id.* at 408 (Kennedy, J., concurring). Thus, there is no conflict between the decision below and the decision of this Court in *Sheridan*.

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[2] In *United States* v. *Shearer*, 473 U.S. 52, 55 (1985), the opinion of the four Justices who reached the issue specifically rejected this theory by stating that a plaintiff:

> cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee.

Three Justices concurred in the judgment and the remainder of the opinion, but did not join this part of the opinion. Justice Marshall concurred in the judgment only. Justice Powell took no part in the decision.

With the exception of the Ninth Circuit, every court of appeals that has considered the issue since *Sheridan* has held, consistent with the decision of the Fourth Circuit below, that the statutory bar on recovery for claims arising out of assaults and batteries cannot be circumvented by pleading that the assault or battery that injured the plaintiff was caused by the government's negligent supervision. See, *e.g.*, *Billingsley* v. *United States*, 251 F.3d 696, 698 (8th Cir. 2001) (barring claim of negligent supervision of a Job Corps enrollee if the battery he committed occurred within the scope of his employment and government did not breach a duty unrelated to employment relationship); *Leleux* v. *United States*, 178 F.3d 750, 757 (5th Cir. 1999) (barring claim of negligence against United States in seduction of recruit by Navy serviceman because negligence did not arise out of "an independent, antecedent duty unrelated to the employment relationship between the tortfeasor and the United States"); *Perkins* v. *United States*, 55 F.3d 910, 916-917 (4th Cir. 1995) (rejecting "negligent supervision" and "negligent retention" claims); *Franklin* v. *United States*, 992 F.2d 1492, 1498-1499 (10th Cir. 1993) (barring claim of negligence against United States in case of medical battery by VA hospital employee because claim was contingent on employment relationship); *Guccione* v. *United States*, 847 F.2d 1031, 1034 (2d Cir. 1988) (barring claim that United States was negligent in failing to supervise undercover agent because claim was not independent of employment relationship), cert. denied, 493 U.S. 1020 (1990).

These decisions are consistent with pre-*Sheridan* decisions of numerous courts of appeals. See, *e.g.*, *Thigpen* v. *United States*, 800 F.2d 393, 395-396 (4th Cir. 1986) (barring assertion of a negligent supervision

claim against United States by children who were sexually assaulted by naval hospital employee); *Hoot* v. *United States*, 790 F.2d 836, 838 (10th Cir. 1986) (dismissing suit alleging that assault occurred because of government negligence in denying soldier's request for mental examination and treatment); *Metz* v. *United States*, 788 F.2d 1528, 1534 (11th Cir.) (holding that negligence claim arose out of excepted claim where underlying conduct, which constituted intentional tort, essential to claim), cert. denied, 479 U.S. 930 (1986); *Johnson* v. *United States*, 788 F.2d 845, 850-854 (2d Cir.) (dismissing suit alleging that assault occurred because of government negligence in employment and supervision of postal employee who assaulted infant), cert. denied, 479 U.S. 914 (1986); *Garcia* v. *United States*, 776 F.2d 116, 118 (5th Cir. 1985) (dismissing claim of negligent supervision of military recruiter who sexually assaulted a prospective recruit).

As noted, however, the Ninth Circuit has held that the statutory bar on recovery for claims arising out of assaults and batteries can be avoided by pleading that the assault or battery that injured the plaintiff was caused by the government's negligent supervision or hiring. See *Senger* v. *United States*, 103 F.3d 1437, 1442 (9th Cir. 1996) (jurisdiction over negligent hiring and supervision claims); *Brock* v. *United States*, 64 F.3d 1421, 1425 (9th Cir. 1995) (same); see also *Bennett* v. *United States*, 803 F.2d 1502, 1503-1504 (9th Cir. 1986) (negligent hiring and supervision).[3]

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[3] A separate line of cases holds that the government's negligent breach of an independent, antecedent duty to protect the victim, as distinct from a duty to control the assailant, states a claim under the FTCA. See, *e.g.*, *Bembenista* v. *United States*, 866 F.2d 493, 498 (D.C. Cir. 1989) (breach of duty to protect blind, comatose hospital patient from sexual assault); *Doe* v. *United States*, 838

2. This case is not an appropriate vehicle for this Court to resolve this conflict between the Ninth Circuit and the other courts of appeals that have considered the question. The unpublished opinion below does not contribute to the split, and an adequate state-law ground supports the judgment. The FTCA provides that the tort law of the state where the act or omission occurred governs liability. 28 U.S.C. 1346(b) (1994 & Supp. V 1999). The Fourth Circuit correctly held that even if petitioner could state a claim that was not barred by Section 2680(h), she would have no cause of action because Virginia law does not impose a duty on the Navy to control English's off-duty actions to prevent him from harming others by the battery alleged. Pet. App. 9a-13a.

Following the Restatement (Second) of Torts §§ 315, 319 (1965), the Virginia Supreme Court has held that a person ordinarily has no duty to control a third person to prevent harm to another. *Marshall* v. *Winston*, 389 S.E.2d 902, 904 (Va. 1990). This general rule does not apply, however, if there is (1) a "special relation" between the defendant and the third party which imposes a duty on the defendant to control the conduct of the third party, or (2) a "special relation" between the defendant and the plaintiff which imposes a duty on the defendant to protect the plaintiff. *Ibid.* The requisite special relation exists if the defendant takes charge of or exercises control over the third party whom he knew

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F.2d 220, 224 (7th Cir. 1988) (breach of duty to supervise children in government daycare). Although petitioner asserts that the government breached a duty to protect her (Pet. 4), she does not contend that the government owed any special duty to her, as distinct from any other member of the public. Rather, she argues only that the government had a duty to control English to prevent him from harming anyone. See Pet. 4-9.

or should have known to be likely to cause bodily harm to another. *Nasser* v. *Parker*, 455 S.E.2d 502, 504-505 (Va. 1995). The Virginia Supreme Court has construed the "taking charge" requirement narrowly, holding that the mere existence of an employer-employee relationship does not suffice. See *Chesapeake & Potomac Tel. Co.* v. *Dowdy*, 365 S.E.2d 751, 754 (Va. 1988). See also *Fox* v. *Custis*, 372 S.E.2d 373, 376 (Va. 1988) (holding parole officers did not take charge of parolee); *Wise* v. *United States*, 8 F. Supp. 2d 535, 549 (E.D. Va. 1998) (holding government had no special relation that would give rise to duty under Virginia law to control the off-duty conduct of service members).

This Court "do[es] not normally disturb an appeals court's judgment on an issue so heavily dependent on analysis of state law." *UNUM Life Ins. Co. of Am.* v. *Ward*, 526 U.S. 358, 368 (1999) (citing *Runyon* v. *McCrary*, 427 U.S. 160, 181-182 (1976)). Moreover, this Court generally defers to the lower federal courts' interpretations of state law. *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.").

Accordingly, the district court properly dismissed petitioner's complaint because it did not state a claim under Virginia law. That state-law ground, upheld by the court of appeals, adequately supports the judgment. Certiorari is therefore inappropriate to consider the alternative federal-law ground that Section 2680(h) bars jurisdiction over this case because it arises out of an assault or battery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2001